No. 15681

United States Court of Appeals
For the Ninth Circuit

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation, *Appellant,*

vs.

ANDERSON CONSTRUCTION CO., INC., a corporation, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S PETITION FOR RE-HEARING

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Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

APPELLANT'S PETITION FOR RE-HEARING

By this petition the appellant respectfully seeks an order of this court granting rehearing en banc on this appeal for the following reasons:

I.

Because By Its Adverse Ruling in its Opinion Filed June, 16, 1958, This Court Disregarded an Elemental Established Principle of Law, To-Wit: That a Prior Oral Agreement is Superseded by a Subsequent Written Contract Between the Same Parties.

This principle is obviously and directly applicable to the appellant's right of recovery against the appellee in this case. To invoke and to enforce this principle does not require reliance upon any essential fact which is presently in dispute on the record.

What are the essential unquestioned facts?

The appellee signed the appellant's formal application for the performance bonds and the payment bonds.

The jury found that when so signed the amount of premium was unspecified therein, and that the appellant's agent in May 1955 orally agreed to allow a reduction below the legal premium by calculating the amount at a rate officially unfiled and unapproved. Later the appellant using forms prescribed by the Government prepared three performance bonds and three payment bonds, each for individual execution by the three members of the appellee's joint venture. After execution by the appellant as surety and subsequent execution by the joint venturors (including the appellee) as principals, all of such bonds were delivered during June 1955 by the authorized corporate manager of the joint venture with four signed copies of its $6,000,000.00 construction contract in a letter to the United States Corps of Engineers which accepted the same with notification to proceed on the job. As required by the short and simple Government forms, which prohibited any deviation, all such bonds declared the exact amount of premium therefor in separate distinct paragraph—the performance bonds stating: "TOTAL AMOUNT OF PREMIUM CHARGED $47,753.72"; and the payment bonds stating: "TOTAL AMOUNT OF PREMIUM CHARGED $ PREMIUM INCLUDED IN CHARGE FOR PERFORMANCE BOND." These statements appeared plainly at the top of the single sheet instruments on the reverse side above certifications of due execution by an officer of each principal with its corporate seal. To repeat, the appellee executed one of these performance bonds and one of these payment bonds—patently for the purpose of making the same effective to conclude the construction contract.

On the facts now uncontroverted in the record, it is clear that the appellant as surety and the appellee with the other joint venturors as principals entered together into a written contract between themselves and with the United States as obligee whereby the premium fixed was the legal premium in the sum of $47,753.72. On these facts it is equally clear that as a matter of law this subsequent written contract superseded the prior oral agreement for an illegal reduced premium.

In this case the record reflects no issue of fact for the jury based on any attempt of the appellee to avoid its definite undertaking as to premium embodied in the bonds, except only the testimony in which its president stated that he personally signed nothing "on the back of those instruments" (R. 116) and that he did not "remember" whether the amount of premium was specified thereon (R. 120). On the record without doubt the bonds did specify the premium in the sum of $47,753.72 (Pre-trial Order, Admitted Facts, R. 57); such is the testimony of the manager of the joint venture who signed two of the bonds, assembled all of them, and caused them finally to be delivered (R. 149-152).

But the bonds being admittedly executed deliberately and duly by the appellee for the purpose intended, their legal effect as a contract obligation cannot be escaped by the appellee merely because its president who placed his signature on the face of the instruments could not "remember" whether the premium figure appeared on the back of those same instruments above the certifying signature of another corporate officer acting for the appellee. Such certainly is the applicable law, as summar-

ized generally by the textbooks, as recognized particularly by this court and as declared positively by the Supreme Court of the State of Washington.

> "One who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation."
>
> *Restatement of the Law of Contracts, Vol. 1,* § 70, page 73.

> "In the absence of a valid excuse one is under a duty to read a contract before signing it, and although he fails to do so will nevertheless be bound by the terms of his written contract; nor may he avoid responsibility by the claim that he did not comprehend the plain meaning of the terms employed.
>
> "As a general rule a person cannot avoid a written contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, or that it was a mere form, and this doctrine has been affirmed by numerous courts quoting and citing Corpus Juris with approval on such well settled rule. In that connection it has been said that one is under a duty to learn the contents of a written contract before he signs it, and that if, without being the victim of fraud, he fails to read the contract or otherwise to learn its contents, he signs the same at his peril, and is estopped to deny his obligation, will be conclusively presumed to know the contents of the contract, and must suffer the consequences of his own negligence."

Corpus Juris Secondum Vol. 17, § 137, pp. 487, 490.

"Although apart from statute a signature is not necessary to the formation of a contract, it may serve as a manifestation of an intent to make a contract. A signature with a lead pencil is sufficient. A party is bound by a written contract even though his signature does not appear at its end. If his name, written by himself, appears in any part of the agreement, it may be taken as his signature, if it was written for the purpose of giving authenticity to the instrument and thus operating as a signature. Therefore, words written on the back of a contract blank as a portion of the instrument to be signed by the parties become part of the obligation, although the signatures are not below them, but on the preceding page."

American Jurisprudence, Vol. 12, § 61, pp. 551, 552.

"Ordinarily, delivery and acceptance are considered together by the courts to be the last steps essential to complete a binding contract of insurance. Thus it has been held that acceptance by the insured is as essential as is acceptance by the insurer. And, once such acceptance has been given, it binds, not only the insurer, but the insured as well for all purposes."

Insurance Law by Appleman, Vol. 1, § 171, p. 172.

"The insured is under a positive duty to read the contract delivered to him, and he will be presumed to have done so. By acceptance and retention, therefore, without objection to the terms thereof, the insured is precluded from stating that he did not

know the terms thereof or did not intend to accept the contract in that form. *Mere retention of the contract* over a long period of time *is sufficient to preclude the insured thereafter from contending that the contract was not accepted,* and that he should not, therefore, be bound by representations contained therein, provisions as to payments, or *as to premium obligations.*"

Insurance Law by Appleman, Vol. 1, § 173 pp. 174, 175.

"However, when the insured accepts a policy, he accepts all of its stipulations, provided they are legal and not contrary to public policy. Where changes from the application appear in the delivered contract under a more stringent doctrine, the insured has a duty to examine it promptly and notify the company immediately of his refusal to accept it. If such policy is accepted or is retained an unreasonable length of time, the insured is presumed to have ratified any changes therein and to have agreed to all its terms.

"An acceptance and retention without objection is an acceptance of all terms and conditions contained in the policy, and an estoppel arises to prevent the insured from asserting that the policy is not the contract of the parties. The limitations and terms of the policy are held conclusive upon the insured, though he did not understand them, and his acceptance of a policy containing certain warranties may be equivalent to warranting the truth of such matters. Nor is it any excuse that the insured had neglected to read the policy or to familiarize himself with its terms."

Insurance Law by Appleman, Vol. 12, § 7155, pp. 220, 221.

Almost one hundred years ago, the Supreme Court of the United States ruled:

> "That the defendant did not read the charter and by-laws, if such were the fact, was his own fault. It will not do for a man to enter into a contract and, when called upon to respond to obligations, to say that he did not read it when he signed it, or did now know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission."
>
> *Upton v. Tribilcock,* 91 U.S. 45, 23 L.Ed. 202, 205.

In a case originating in the State of Washington, this court said:

> "It is a fundamental rule that a person in possession of all his faculties, who signs an instrument for the purpose of giving effect thereto, cannot evade the consequences of the document by merely neglecting to read it. Upton v. Tribilcock, 91 U.S. 45, 50, 23 L.Ed. 203."
>
> *Ford Motor Co. v. Pearson,* 40 F.(2d) 858, 867 (1930 CCA9).

In a later case, quoting from a number of decisions by the Supreme Court of the State of Washington, this court recognized the law in that jurisdiction by an opinion saying:

> "The law of Washington is well settled to the effect that one who will not use the opportunities open to him to determine what his contract is, and if such opportunities would propably have revealed

the defect, he cannot have reformation for mistake. In Johnson v. Spokane & Inland Empire R. Co., 104 Wash. 562, 177 P. 810, 812, the court said: 'We have always held that a party whose rights rest upon a written instrument which is plain and unambiguous, and who has read or had the opportunity to read the instrument, cannot claim to have been misled concerning its contents or to be ignorant of what is provided therein.' And again in the same case: 'The means of knowledge are equivalent to knowledge. A clue to the fact which, if followed up diligently, would lead to discovery, is in law equivalent to a discovery.'

"This doctrine was reaffirmed in the case of Kelley v. Von Herberg, 184 Wash. 165, 50 P.(2d) 23 where the court quoted the same language as used in the Johnson case, supra, with approval. Following this rule as established by the Washington court, the plaintiffs cannot claim ignorance of the coverage in the policy. Myhre intrusted the matter of writing the insurance to Langer, who wanted it for the protection of his Bank. Myhre gave Langer no instructions except as to the amounts of $2,500. and $1,500. Myhre's obligation to read the policy was the more imperative because of this. Certainly the insured has some duties as well as the insurer. The insured owes the obligation to examine his policy and to inform the insurance company wherein it is not as he intended it. Nor is this a case where the insured had to resort to the fine print on the policy to tell whom and what it covered. The fact that it covered a dwelling house was as apparent from a mere glance at the face of the policy as was the identity of the insured. To read at all the description and conditions of coverage in the inside of the policy would have disclosed

that the property was covered *only* while used for dwelling house purposes. Further, common and ordinary prudence should have suggested to Myhre, when he found that Langer had left him out of the policy, to pursue his investigation so as to determine whether he was properly protected in other respects; yet he asked Langer to correct the policy only by putting his name on it. He was content to take chances on the rest of the policy. According to Myhre's testimony, the policy was a matter of extreme unimportance to him. He did not seek it. He paid for it apparently only because the bank required a policy. While it is possible to suppose that Myhre did see the description on the policy, though he said that he did not, it is still the duty of the insured to read his policy so as to ascertain the contents and if the policy is unsatisfactory, to object thereto at that time and not wait for the loss long afterward and then claim a right of reformation. The Washington case of Hayes v. Automobile Ins. Exchange, 126 Wash. 487, 218 P. 252, 253, states with reference to an insurance policy containing false statements which were claimed not to have been read: 'Whether he read it or not is immaterial. It was his duty to read it, and the law says that he did read it.' When the same case came before the court enbanc for a rehearing, 129 Wash. 202, 224 P. 594, 595, the court said: 'Whether he read the policy or not is immaterial, for the law charges him with the duty of reading it.' These statements are reaffirmed in Perry v. Continental Insurance Co., 178 Wash. 24, 33 P.2d 661 and McCann v. Reeder, 178 Wash. 126, 34 P.2d 461. To say in the instant case that had he read the insurance policy, the insured would not have been apprized of the mistakes claimed, if mistakes they were, is inconceiv-

able. The Court of Washington further expressed itself in the case of Carew, Shaw & Bernasconi v. General Casualty Co., 189 Wash. 329, 65 P.2d 689, 694, disposing of this exact problem by stating: 'Even if we did not agree with the trial court that the policy truly reflects the quotation made to Shaw, the negligence of appellant would defeat its action for reformation. Appellant is presumed and is required to know the provisions of the insurance contract, as it would any other written contract into which it enters. It will not do for appellant's vice president to say that he did not read the policy. Whether he or any of the other officers or agents of appellant read the policy is immaterial. It was appellant's duty to read the policy, and the law says that that was done. Hubenthal v. Spokane & Inland R. Co., 43 Wash. 677, 86 P. 955; Hayes v. Automobile Ins. Exchange, 126 Wash. 487, 218 P. 252; Perry v. Continental Insurance Co., 178 Wash. 24, 33 P. (2d) 661; McCann v. Reeder, 178 Wash. 126, 34 P.(2d) 461; Kelley v. Von Herberg, 184 Wash. 165, 50 P.(2d) 23.' "

Fidelity & Guaranty Fire Corp. v. Bilquist, 108 F.(2d) 713, 717 (1940 CCA9).

In a still later case with respect to the law applicable in the State of Washington, this court said:

"A reading of the policy would have disclosed the limiting provision, with the word 'Washington' capitalized and placed therein, and we can hardly agree with appellants that the trial court erred in refusing to hold that the limitation was inserted through inadvertance and contrary to the agreement of all concerned. The later actions of the parties suggest, at the most, a conflict in the evidence which is insufficient for purposes of reforma-

tion. The fact that appellant, Van Meter, did not see the policy prior to the loss does not aid him. The policy was held by the finance companies, but this did not negative his right to inspect it; secondly, these companies held their rights to the policy through Van Meter and at his instance. The fact that all failed to notice a provision, which could readily be seen, and take exception thereto does not prevent the operation of the provision."

Van Meter v. Franklin Fire Ins. Co., 164 F. (2d) 325, 327 (1947-CCA9).

Since these recognitions by this court of the law applicable in the State of Washington, its Supreme Court in 1953 adhered to its own earlier decisions by saying:

"Appellant had ample opportunity to examine the contract in as great a detail as he cared, and he failed to do so for his own personal reasons. Under these circumstances, he cannot be heard to deny that he executed the contract, and he is bound by it. 12 Am. Jur. 628, § 137; 1 Williston on Contracts (Rev. ed) 89, § 35; Perry v. Continental Ins. Co. 178 Wash. 24, 33 P.(2d) 661; and Terminal Trading Co. v. Babbit, 7 Wn.(2d) 166, 109 P.(2d) 564,"

Lake Air, Inc. v. Duffy, 42 Wn.(2d) 478, 480.

In rejecting the appellant's contention based upon the execution of the performance and payment bonds by the appellee and by its joint venture, the opinion of this court said: "There is no evidence that Anderson knew of or intended to be bound by a statement by Guaranty to the United States of the premium charged for the bond, which was made on the back of the formal instrument." The essence of this comment in the opinion is a postulate of law opposed to and repudiated by the nu-

merous authorities above quoted, including this court's own precedents as to the law of the State of Washington.

Again, in rejecting the appellant's contention based upon the execution and delivery of the performance and payment bonds by the appellee and its joint venture, and after observing that the verdict necessarily implied a jury finding of an oral agreement for a reduced premium, the opinion of this court said that: "Therefore, there *could* have been no express contract in writing between the parties." This remark in the opinion could and would be correct if an issue of fact before the jury were whether (in the alternative) an oral or a written contract had been made; or if an issue of fact before the jury were whether the bonds had been executed and delivered by the appellee and its joint venture. There were no such issues. The appellee by its answer alleged and by its testimony satisfied the jury that an *earlier* oral agreement had been made. The appellant, by the pleadings, the admissions in the pre-trial order, and all of the evidence, established without controversy that a *subsequent* written contract had been made.

In consequence as a mere and clear matter of law the lower court should have instructed the jury to return a verdict for the appellant as requested, or should have granted the appellant's motion for judgment notwithstanding the verdict or appellant's motion for a new trial. In further consequence as a mere and clear matter of law this court should have reversed the lower court.

II.

Because by Its Adverse Ruling in Its Opinion Filed June 16, 1958, This Court So Misconstrued the Insurance Code of the State of Washington in Its Awkward Application to Guaranty Insurance as to Call for a Rehearing, En Banc, Considering Its Enfeebling Influence Upon Wholesome Statutory Regulation of the Nation-wide Surety Business.

Solely for the sake of present brevity but in the prospect of future opportunity, the appellant refrains here from reargument related to the Washington Insurance Code, now relying upon its briefs in this appeal which this court is invited to review.

However, while readily appreciating that the rulings of appellate courts in other states do not govern this court in giving judicial expression to the law of Washington, some of the decisions (previously uncited) in other jurisdictions, interpreting comparable statutes which hold void agreements to deviate from legal insurance premiums, should be read by this court with persuasive respect before adhering to its own unfortunate contrary opinion.

Sunshine Bus Lines v. American Fidelity and Casualty Co., 75 F.(2d) 427 (CCA 5 (Texas) 1935);

American Mutual Liability Ins. Co. v. Plywoods-Plastics Corp., 81 F. Supp. 157 (DC SC, 1948);

Walker v. Bituminous Casualty Corp., 74 Ga. 517, 40 S.E.(2d) 228 (Ga., 1946);

Century Cab Inc., et al., v. Commissioner of Insurance, et al., 327 Mass. 652, 100 N.E. (2d) 481 (Mass., 1951);

Employers' Liability Assurance Corp. v. Arthur Morgan Trucking Co., 236 Mo. App. 445, 156 S.W.(2d) 8 (Mo., 1941);

Stephen Peabody Jr. & Co. v. Travelers' Ins. Co., 240 N.Y. 511, 148 N.E. 661 (N.Y., 1925);

Employers' Liability Assurance Corp. v. Success-Uncle Sam Cone Co., Inc., 208 N.Y.S. 510 (N.Y., 1925);

Ocean Accident & Guarantee Corp. v. Albina Marine Iron Works, 122 Ore. 615, 260 Pac. 229 (Ore., 1927);

Manufacturers Casualty Ins. Co. v. Daison Mfg Co., Inc., 16 Pa. D. & C. 803 (Penn. 1932);

Glen H. McCarthy Co. v. Knox, 196 S.W.(2d) 832 (Texas, 1945);

Associated Employers Lloyds v. Dillingham, 262 S.W.(2d) 544 (Texas, 1953).

In the *American Mutual Liability Ins. Co.* case, *supra,* the court stated:

> *"Courts of other jurisdictions have held consistently that when insurance rates are fixed by a state agency, contracts providing for different rates are unenforcible.* Great American Indemnity Co. v. Abbott Glass Co., 149 Misc. 437, 267 N.Y.S. 523; Peabody, Jr., & Co. v. Travelers Ins. Co., 240 N.Y. 511, 148 N.E. 661, 42 A.L.R. 1090; Employers Liability Corp. v. Success-Uncle Sam Cone Co., 124 Misc. 614, 208 N.Y.S. 510. The rule is analogous to that which makes rates for common carriers set by State or Federal agencies inviolable and not subject to change by the carrier and the shipper regardless of the equities existing between them. White v. Southern Ry. Co., 208 S.C. 319, 38 S.E.

(2d) 111, 165 A.L.R. 988; Central R. R. Co. of New Jersey v. Mauser, 241 Pa. 603, 88 A. 791, 49 L.R.A., N.S., 92." (Emphasis added).

American Mut. Liability Ins. Co. v. Plywoods-Plastics Corp., 81 F. Supp. 157 (DC SC 1948).

In the case of *Associated Employers Lloyds v. Dillingham, supra,* the applicable rule of law was stated as follows:

"The establishment of premium rates is vested exclusively in the Commission and the rates promulgated by the Commission are not subject to alteration by agreement, waiver, estoppel, or any other devise. As a matter of law, the insurance carrier agrees to collect, and the subscriber agrees to pay, the rate prescribed by the Commission. That rate is part of every contract, regardless of any understanding by the parties. The insurance carrier cannot charge more, or bind itself to take less, than the prescribed lawful rate of premium. *A contract to rebate, directly or indirectly, any part of the prescribed premium is illegal and void, and cannot be a defense in a suit for the full premium. Where a rate is prescribed by one of the state's regulatory bodies, it is the only rate the parties can contract for.*"

Associated Employer's Lloyds v. Dillingham, 262 S.W.(2d) 544 (Texas 1953) (Emphasis added).

In the case of *Stephen Peabody Jr. & Co. v. Travelers' Ins. Co., supra,* the Court of Appeals of New York stated:

"The gist of the complaint is that the defendant contracted with the plaintiff and the New York

Dock Company that its premium rates would not exceed a certain fixed and definite amount, notwithstanding any subsequent revision of rates by the compensation inspection rating board of the state of New York.

* * *

"As the Insurance Law recognizes the rating association, it is to be presumed that the rates and schedules fixed by such an association within the state of New York were properly adjusted to the risks, and met with the approval of the superintendent of insurance who was given supervision over them. *A contract to disregard an increase in such rates or basis rate, and to ignore the disapproval of the rating association, and therefore of the superintendent of insurance was against public policy and void.*"

Stephen Peabody Jr. & Co. v. Travelers' Ins. Co., 240 N.Y. 511, 148 N.E. 661 (N.Y., 1925) (Emphasis added).

This court can judicially note that probably all states have felt the necessity of legislation regulating all kinds of insurance which has become an inherent part of almost all business in this country. The appellant feels confident that this court, sitting en banc, will reach a conclusion which will tend to discourage whispered deals and cut-throat competition.

Respectfully submitted,

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CERTIFICATE

Pursuant to Rule 23 of this court, I, LANE SUMMERS, hereby certify that I have prepared and signed the foregoing petition in behalf of the appellant, that in my judgment it is well founded, and that it is not interposed for delay.

LANE SUMMERS